

December 10, 1996

VIA UPS Next Day Air

Docket Office
California Public Utilities Commission
505 Van Ness Avenue, Room 2001
San Francisco, California 94102

Re: R.94-04-031/I.94-04-032

Dear Docket Clerk:

Enclosed for filing in the above-entitled matter are the original and five copies of the **REPLY COMMENTS OF THE CALIFORNIA ENERGY COMMISSION IN RESPONSE TO THE OCTOBER 30, 1996 DIRECT ACCESS WORKING GROUP REPORT ON CONSUMER PROTECTION AND EDUCATION**. Please return the extra copy in the enclosed, stamped, self-addressed envelope. Thank you for your attention to this matter.

Very truly yours,

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Enclosures

cc: Restructuring Service List

**BEFORE THE CALIFORNIA PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking)
The Commission's Proposed Policies)
Governing Restructuring California's)
Electric Services Industry and)
Reforming Regulation)

R.94-04-031
(Filed April 20, 1994)

Order Instituting Investigation on)
the Commission Proposed Policies)
Governing Restructuring California)
Electric Services Industry and)
Reforming Regulation)

I.94-04-032
(Filed April 20, 1994)

**REPLY COMMENTS OF THE CALIFORNIA ENERGY COMMISSION IN RESPONSE
TO THE OCTOBER 30, 1996, DIRECT ACCESS WORKING GROUP
REPORT ON CONSUMER PROTECTION AND EDUCATION**

December 10, 1996

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The California Energy Commission (CEC) offers the following reply comments to the California Public Utilities Commission (CPUC) in response to parties' first-round comments on the October 30 Report, "Consumer Protection and Education in a Restructured Electric Industry," by the Direct Access Working Group (DAWG). Each of the following sections is devoted to one of the major issues discussed by parties in their comments. The final section addresses a prevalent strategy that has appeared in several of the parties' comments, namely, to demonize any and all regulation and to assert unequivocally that the market will solve all problems in the best possible way for all consumers. In contrast, the CEC emphasizes the need to see government and the market as complementary rather than opposed, to balance regulatory and free-market approaches to problems rather than choosing one to the exclusion of the other, and to utilize open, participatory processes to develop workable solutions that encompass the needs of all affected parties.

1. Consumer Principles

The CPUC should take a position on the "Consumer Principles for Restructuring," even if the position is that these principles are not useful or workable. Parties to the DAWG process have invested substantial effort in developing these principles and they deserve a formal response. The CEC believes, moreover, that there would be great value if the CPUC were to address the principles one by one while providing preferred interpretations for those principles it supports. The CEC disagrees with SDG&E's assertion that these principles are "hopelessly vague" and will "lead to unnecessary customer confusion."¹ Although there is some validity to the criticism that the principles by themselves do not provide specific solutions to all the problems at hand, by identifying its preferred interpretations, the CPUC will clarify its philosophical

¹ Comments of San Diego Gas & Electric Company on The Consumer Protection and Education Report in a Restructured Electric Industry (11/26 comments by SDG&E) at 5.

approach to consumer protection and education issues and thus provide guidance for further implementation activities.

2. Consumer Education Plan (CEP)

In our November 26 comments, the CEC supported the idea of a CPUC-authorized "CEP Group" to develop a detailed plan for consumer education activities targeted to small customers during 1997. The draft CEP filed jointly by the IOUs represents a good first effort at providing such a plan.² The CEC disagrees, however, with UCAN's statement that the IOU plan was drafted by "the parties who were most active in the drafting of the [October 30] Report"³ and the implication that the IOU draft CEP represents a consensus of the DAWG Subgroup on Consumer Protection and Education (Subgroup D). The CPUC should be aware that some of the most active participants in DAWG-D and the October 30 Report, including the ORA and the CEC, were not informed about meetings to develop the IOU draft CEP and were thus excluded from the process. Moreover, adequate stakeholder input could not have been obtained by mailing an early draft of the IOU plan to the DAWG service list on November 13 with no advance notice, and requesting responses by November 19.⁴

Regarding the content of the IOU draft CEP, the CEC supports many of the conceptual elements but recommends that the details be developed by a broadly representative Stakeholder Board. The CPUC should affirm that it will not sacrifice the openness of the process for the sake of expediency. Specifically, we recommend that the CPUC:

² Comments on Consumer Education of Pacific Gas and Electric Company, Southern California Edison, and San Diego Gas & Electric Company (11/26 joint comments by PG&E, SCE and SDG&E).

³ Comments by Utility Consumers' Action Network on Direct Access Working Group Consumer Protection and Education Report (11/26 comments by UCAN) at 2.

⁴ 11/26 joint comments by PG&E, SCE and SDG&E at 2, fn. 2.

- a. approve the concept and specify the mission of a Stakeholder Board to oversee and direct the development and implementation of a CEP and other consumer education elements as discussed in item 3 below, and should authorize the DAWG to hold an open meeting as soon as possible to determine the structure of the Board and select its participating organizations;
- b. allow recovery of legitimate expenses for all participants in the Stakeholder Board, not just the IOUs, to enable meaningful participation by all relevant interest groups;⁵
- c. direct the Stakeholder Board to begin immediately to assess the need for an independent consultant and develop drafts of a work plan, consultant qualifications and a request for interest (RFI). The CPUC should not allow the IOUs, under the banner of urgency and "on behalf of the DAWG," to exclusively determine the available consultant pool as they intend to do.⁶

The CEC has a strong interest in participating in the CEP process and the Stakeholder Board, and would commit staff resources to help facilitate them as we did for the DAWG and its two reports.

3. A Comprehensive Approach to Consumer Education

Expanding on item 2(a) above, the CEC recommends that the CPUC specify a somewhat broader mission for the Stakeholder Board than that envisioned in the joint

⁵ In connection with this point, the CEC supports the recommendation of Section 4.4 of the October 30 DAWG Report that the CPUC review with the intent of revising the existing intervenor compensation rules.

⁶ 11/26 joint comments by PG&E, SCE and SDG&E at 5.

IOU proposal. Specifically, the Stakeholder Board should take a comprehensive view of consumer education, in terms of both time frame and participating entities. Thus, in addition to overseeing a near-term CEP, the Board should be responsible for developing a detailed proposal for the education trust and for examining other elements of consumer education, such as provision of trustworthy market information for consumers (see item 4 below) and educational enhancements to energy bills. These and perhaps other activities should be initiated early in 1997 in parallel to CEP activities, and should continue after the near-term CEP has been implemented.

In our November 26 comments, the CEC indicated a need for "ongoing comprehensive oversight of consumer education that encompasses all market participants."⁷ In contrast, the CEP and the Stakeholder Board as conceived in the joint IOU filing would focus narrowly on those education activities needed to prepare consumers for the opening of the restructured marketplace in 1998. Moreover, in the IOUs' view, the Board would disband once the near-term CEP is implemented and evaluated. This narrow concept of the Stakeholder Board neglects the need for a comprehensive overview of consumer education. While there is a need for a narrowly focused CEP as the IOU plan proposes, the Board overseeing such a CEP should not be isolated from other, equally important consumer education activities. Accordingly, the CEC believes that the most efficient way to achieve participatory oversight of the entire education effort is to empower the Stakeholder Board to take a comprehensive view from the beginning.

4. Assisting Consumers by Providing Trustworthy, ESP-Specific Market Information

⁷ Comments of The California Energy Commission Response to the October 30, 1996 Direct Access Working Group Report on Consumer Protection and Education (11/26 comments by the CEC) at 2.

Several parties have suggested that providing consumers with only generic education about the restructured electric industry is sufficient to prepare them in 1998 to make intelligent, self-interested choices based on adequate, reliable information provided by the market.⁸ This suggestion is dangerously naive. It is simply not realistic to expect competing energy service providers (ESPs) to present their offerings so as to be readily comparable to one another. Given the psychology of consumer decision making and the small potential benefits for most small customers, the market incentives of competitive firms work against allowing easy discovery of comparable prices. As evidence the CEC notes that even after more than a decade of long-distance telephone competition such comparisons are extremely difficult to make.

Generic-only consumer education, where small consumers are not assisted with information or analyses for comparing ESPs, favors existing firms who have strong name recognition and large newcomers who have large advertising budgets. The CEC recommends, therefore, that ESP-specific comparative information be compiled and made available to consumers through a public entity. In contrast to the dire predictions of Enron,⁹ we believe that this activity can be performed without placing onerous burdens on ESPs or creating "a costly avalanche of information" or causing consumers to make decisions based on inaccurate data or creating a cumbersome new bureaucracy.

⁸ 11/26 comments by SDG&E at 7; Enova Energy Comments on Direct Access Working Group Report on Consumer Protection and Education Report in a Restructured Electric Industry in Response to May 17, 1996 Joint Assigned Commissioner Ruling (11/26 Comments by Enova) at 3; Comments of Enron Capital & Trade Resources on Direct Access Working Group Report on Consumer Protection and Education Report in a Restructured Electric Environment (11/26 Comments by Enron) at 8-9; and Comments of the Energy Producers and Users Coalition and Cogeneration Association of California on Direct Access Working Group Report on Consumer Protection and Education Report in a Restructured Electric Industry in Response to May 17, 1996 Joint Assigned Commissioners' Ruling (EPUC/CAC) at 6.

⁹ 11/26 comments by Enron at 9.

The CEC wishes to remind the CPUC of the CEC's responsibility under the Warren-Alquist Act to "serve as a central repository within the state government for the collection, storage, retrieval and dissemination of data and information on all forms of energy supply, demand, conservation, public safety, research and related subjects." (Pub. Res. Code § 25216.5(d)) It is fully consistent with the Warren-Alquist mandate for the CEC to collect, maintain and disseminate comparative information on ESP service offerings and to develop analyses and analytic tools to assist consumers in making intelligent, self-interested choices in the new marketplace.

5. Registration of ESPs

Several commenters assert that anything beyond the most minimal registration requirements will completely stifle competition.¹⁰ The fact is that all kinds of competitively-provided services and products are subject to licensing, codes of conduct, bonding, suspension of licenses and other meaningful consumer protection measures, particularly where necessary services or public health and safety are involved. Prudent consumer safeguards do not stifle competition. Quite the contrary, properly crafted, they enable competition by creating consumer confidence in the market.

The alarmist view asserts that rational and effective registration requirements will be especially burdensome to new entrants and thus tip the playing field in favor of the incumbent utilities.¹¹ The CEC asserts just the reverse, that the absence of such requirements will favor the incumbents. Wary customers tend to stay with the familiar,

¹⁰ 11/26 comments by SDG&E at 13-14; 11/26 Comments by Enova at 2; 11/26 Comments by Enron at 4-7; and 11/26 Comments by EPUC/CAC at 11-12. The view of Enron should be viewed alongside their recent petition to the CPUC to open an OIR on standards of conduct for marketing affiliates of regulated electric and gas distribution utilities. Apparently Enron's "don't regulate the market" position, as expressed in its 11/26 comments on the DAWG report, is evolving into a "regulate them but not us" position.

¹¹ 11/26 comments by Enron at 7.

even when better deals are available, because they cannot distinguish the reliable from the fly-by-night newcomer. This is the well-known "market for lemons" problem, a clear case where government can improve upon the unregulated outcome.

In making the argument, the CEC acknowledges its philosophical preference for limited, tailored preventive measures where feasible. Thus we recommend that the CPUC enact prudent regulatory measures to reduce the potential for obvious market abuses, rather than giving market players minimal scrutiny and repeating the wishful mantra that "a competitive market will sort out appropriate behavior."¹² Total reliance on after-the-fact redress of market abuses, which can be expensive, slow, highly variable in outcome and can only occur after harm is done, will be much more costly to consumers than creating reasonable regulatory incentives for appropriate behavior. The market may well sort out appropriate behavior, but the CPUC must consider how long that may take and how much it may cost.

Some parties contend that AB 1890 is the final word on registration of providers, that it denies the CPUC the authority to do anything more than enact the registration requirements specified in § 394(a), and that therefore the case is closed and any further activity in this area would be a waste of effort.¹³ The CEC disagrees with this position. AB 1890 does not limit registration to requiring just the four items specifically mentioned in § 394(a).¹⁴ EPUC/CAC cites Gikas v. Zolin, 6 Cal. 4th 841, 25 Cal. Rptr. 2d 500 (1993) to argue that items not mentioned are deliberately excluded. But § 394(a) says that "registration shall *include* the following seller information ..." [emphasis added] and therefore Gikas is inapposite. The California Supreme Court

¹² 11/26 comments by Enron at 6.

¹³ 11/26 comments by SDG&E at 11; 11/26 Comments by Enova at 3; 11/26 Comments by Enron at 4-5; and 11/26 Comments by EPUC/CAC at 3-4.

¹⁴ Those are: provider name, address, telephone number and agent for service of process.

rejected the use of the rule of statutory construction known as *expressio unius est exclusio alterius* in interpreting a statute that featured the word "including" in the subclause at issue Estate of Banerjee, 21 Cal. 3d 538, 147 Cal. Rptr. 157, 164 (1978). This rule is inapplicable "to a statute the language of which may fairly comprehend many different objects, some of which are mentioned merely by way of example, without excluding others of similar nature ..." Id. In particular, the court expressly noted that the word "including" is "not ordinarily understood as expressing an intent to limit, or to create an exception." Id.

Based on the August 30 and October 30 DAWG Reports and related comments, the CPUC is by now well aware that many parties see a need for enhanced registration requirements. Some have even argued that AB 1890 actually requires the CPUC to develop whatever procedures are needed to ensure meaningful consumer protection.¹⁵ Thus there is wide support among stakeholders for more effective registration procedures. The CEC supports the view that the CPUC should, with participation of interested stakeholders, develop a detailed proposal for effective consumer protection and then approach the legislature to ensure it has the authority to implement the proposal through legislation or rulemaking.

Finally, because the question of CPUC authority in the area of registration is still controversial, the CPUC should consider options for voluntary certification, industry codes of conduct and bonding that some parties have proposed.¹⁶ Scrupulous ESPs, which we expect most will be, should find it to their advantage for the CPUC to publicly notice their voluntary compliance with certification, codes of conduct or bonding

¹⁵ Comments of Southern California Edison Company on the Direct Access Working Group October 30, 1996 Report on Consumer Protection and Education (11/26 comments by SCE) at 5.

¹⁶ 11/26 comments by SDG&E at 13.

guidelines. Such notice would provide valuable guidance to consumers in choosing reliable providers.

6. Dispute Resolution

Some parties argue that the court system is the only proper venue for resolving disputes in the restructured environment, and that the CPUC should limit its role to monitoring complaints and making this information available to the public.¹⁷ This approach, however, would discourage many small consumers from pursuing legitimate complaints. A system of dispute resolution for this industry will be meaningful only if it is readily accessible to small consumers, prompt and fair in reaching decisions, and can help guarantee that compensation will be made where appropriate. The CEC believes the CPUC is responsible for ensuring that such a system is implemented. The CPUC already has in place a system for resolution of ratepayer complaints that could be expanded to include consumer complaints against ESPs. The ideas proposed by ORA are a good point of departure for developing the details.¹⁸

7. The Need to Dismiss Alarmist, Polarized Visions

The CPUC will undoubtedly note that certain parties insist on polarizing the world into two opposite and extreme scenarios. Some such parties see an oppressive regulatory regime versus a benevolent and bountiful free market,¹⁹ while others see a need for a protective regulatory womb to shelter consumers from a greedy marketplace. While

¹⁷ 11/26 comments by SDG&E at 10.

¹⁸ Comments of the Office of Ratepayer Advocates in the October 30, 1996, Consumer Protection and Education Report of the Direct Access Working Group (11/26 comments by ORA) at 5-8.

¹⁹ 11/26 comments by Enova at 1-2.

we are fully confident that most parties will not be taken in by this false dichotomy, the CEC offers a few remarks to keep the discussion connected to the surface of the earth.

First, this polarization is not a constructive way to characterize the alternatives. Regulation is neither a foolproof protection nor a deadly oppressor. The market is neither the enemy of the people nor the messiah. A major lesson of restructuring thus far is that both the market and the government have potential benefits and pitfalls, and the task we should be addressing is to find a balance between them, the right kind and amount of regulation to correct for the imperfections of the market. Therefore, in areas where two extreme, alternative scenarios appear in the October 30 DAWG Report, the CPUC should see these not as the only two options, but simply as a way to demarcate the broad range of possibilities.

Second, market and government are not the only two approaches to resolving the issues. There is a third approach whose potential is just beginning to be tapped: the use of stakeholder groups to develop workable, cooperative solutions to problems through open, facilitated processes in which all affected parties participate. Many parties to the restructuring are aware of the potential of this approach, but it faces difficulties because it is relatively unfamiliar and because some parties have more to gain by trying to impede or circumvent cooperative approaches than by cooperating. The CPUC can play a positive role by authorizing, supporting and setting clear objectives for a few such groups to address specific consumer protection and education issues, and most of all by refusing to buy into government-versus-market rhetoric. The CEC believes that the transition to a more market-oriented industry entails a parallel transition away from the traditional adversarial regulatory model toward a more cooperative approach to solving industry problems.

Third, those who advocate the pure "free" market, where meaningful oversight and regulation are unnecessary if not oppressive, usually implicitly assume the textbook ideal of perfect competition. This ideal requires that there are many sellers of a

uniform product, all of whom are so small as to have no individual influence over the market price. It also requires a free flow of information; in particular, knowledge by consumers of the price and quantity deals available in the market, and knowledge by suppliers of what consumers want. Neither of these assumptions accurately fits the electric industry. Some sellers are large and established, and have detailed customer information and name recognition. Some consumers are large as well, and have buying power that smaller consumers do not. And, as the CPUC recognized in Decision D. 95-12-063, market information is by no means free flowing. When these textbook assumptions fail, the unregulated free market favors the advantaged players who, in turn, espouse anti-regulatory, free-market ideology in order to maintain their advantages.

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